

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1440

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1440

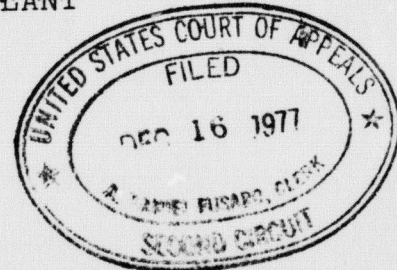
UNITED STATES OF AMERICA,
APPELLEE,

-vs-

VALDEMAR DaSILVA PEREIRA,
APPELLANT.

On Appeal from the United States District Court
for the District of Connecticut

APPENDIX TO BRIEF FOR APPELLANT



PETER GOLDBERGER
ASST. FEDERAL PUBLIC DEFENDER
770 CHAPEL STREET
NEW HAVEN, CONNECTICUT 06510
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ATTORNEY FOR APPELLANT

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

-VS-

VALDEMAR DaSILVA PEREIRA

Docket Number N-77-72Hon. T. F. Gilroy Daly
(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that Valdemar DaSilva Pereira appeals to
the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other
(specify) _____ entered in this action on October 20, 1977.
(Date)

Date Oct. 25, 1977

To: Hugh W. Cuthbertson, Esq.
Asst. U.S. Attorney
P.O. Box 1824
New Haven, Connecticut 06508

Address

Peter Goldberger, Esq.
(Counsel for Appellant)

Asst. Federal Public Defender
770 Chapel Street
New Haven, Connecticut 06510

Phone Number

(203) 432-2148
(FTS) 643-8148

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

▶ QUESTIONNAIRE

- ☐ I am ordering a transcript
☒ I am not ordering a transcript
Reason:
☐ Daily copy is available
☐ U.S. Attorney has placed order
☒ Other. Attach explanation

▶ TRANSCRIPT ORDER

- Prepare transcript of
☐ Pre-trial proceedings
☐ Trial
☐ Sentence
☐ Post-trial proceedings

▶ DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE).

Transcript Already Obtained.

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment ☐ Funds ☒ CJA Form 21 Transcript has been paid.

ATTORNEY'S signature

Peter Goldberger

DATE

October 25, 1977

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number
of pages.

Date

Signature

(Court Reporter)

ORIGINAL

1

OFFENSE PD 11 JUDGE/MAGISTRATE Assigned **US** vs **PEREIRA, Valdemar Da Silva** Case No. **63** 77 -77-72 1
 OFFENSE MO 11 **0507**
 MEANOR Mis **205 03**
 FELONY Fel **X**

US TITLE SECTION **8:1326** OFFENSES CHARGED **deported alien found in United States** ORIGINAL COUNTS **1**

U.S. MAG. CASE NO. **77-77-72** Bail - Release
☐ AMT ☐ Fugitive
☐ Set ☐ Pers. Recog.
☐ PSA
 \$ **5,000** Conditions
☐ Date **5/27/77** ☐ 10% Deposit
☒ Bail Not Made ☒ Surety Bond
☐ Status Changed (See Docket) ☐ Collateral
☐ 3rd ☐ Pny Cust ☐ Other

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Magistrate Hearing: 5/27/77	High Risk Date: 6/3/77	Date: 6/10/77	Date: 6/10/77
Summons Served	Indict Waived	Initial Plea: 6/10/77	Final Plea: 9/20/77
First Appearance	In Charging District	Superseding Indict Info	Final Indict

SENTENCE
 Disposition of Charges: **9/20/77**
☒ Convicted ☐ On An Charges
☐ Acquitted ☐ On Lesser Offense(s)
☐ Dismissed ☐ WOP ☐ WVP
☐ On Government Motion

MAGISTRATE		DATE	INITIAL NO	INITIAL APPEARANCE DATE	INITIAL NO	OUTCOME:
Search Warrant	Issued			PRELIMINARY EXAMINATION		☐ DISMISSED
	Return			Date: ☐ Scheduled		☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Summons	Issued			OR		
	Served			REMOVAL HEARING		☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
Arrest Warrant Issued				Date: ☐ Held		
COMPLAINT				☐ WAIVED ☐ NOT WAIVED	Case Number	
OFFENSE (In Complaint)				☐ INTERVIEWING INDICTMENT		

U.S. Attorney or Asst. **Richard Blumenthal** **Peter Goldberger, 770 Chapel Street**
Hugh W. Cuthbertson **New Haven, Conn.**

* Show list names and suffix numbers of other defendants on same indictment/information

DATE	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
6/3/77	Indictment returned and filed at Hartford. Summons to issue for June 10, 1977 at 10:00 A.M. in New Haven. Egan, U.S. Mag. m-6/3/77.	
6/3	Summons issued at Hartford and handed to U. S. Marshal for service.	
6/7	Marshal's return showing service, filed: Magistrate's Temporary Commitment.	
6/10	Notice of Readiness, filed by Govt.	
6/9	PLEA: Plea of not guilty entered to Count 1. Case continued on \$5,000 bond, with surety. Counsel to contact Judge's Chambers on a mutual date for trial. Zampano, J. m-6/10/77.	
6/14	Marshal's Return Showing Service, filed: Summons.	
5/31	U.S. Magistrate's Papers, filed: Docket entries, Magistrate's Warrant of Arrest, Complaint, Magistrate's Temporary Commitment, and Report of Proceedings before Magistrate.	
6/28	On RCZ's Jury Assignment List: Case continued one week. Zampano, J. m-6/28/77	

V. EXCLUDABLE DELAY

DATE	IV PROCEEDINGS (continued)	PAGE TWO	Internal action # (a)	Start Date (b)	Lu Code (c)	Total Days (d)
1977	(DOCUMENT NO.)					
7/7.	Motion for Non-Surety Bond, filed by deft.					
7/15	Motion to Dismiss, filed by deft.					
7/19	On RCZ's Jury Assignment List: over motions pending. Zampano, J. m-7/19/77.					
7/22	Memorandum in Support of Motion to Dismiss, filed by deft.					
7/29	Supplemental Memorandum in Support of Motion to Dismiss, filed by deft.					
7/29	Memorandum of Points and Authorities of the U.S.A. in Opposition to Motion to Dismiss, filed by govt.		3	7/29/77	G	
8/3	Deft's Reply To Govt's Memorandum on Motion to Dismiss, filed.					
8/11	Magistrate's Tape Recording of proceedings held on 8/11/77, filed.					
8/11	Hearing on Motion to Dismiss. Cont'd, see endorsement. Latimer, M. m-8/11/77.		3	8/11/77	E	1
8/11	Following endorsement on Motion to Dismiss: On refferral to undersigned for expedited argument of legal issues, with consent of counsel the instant motion is continued to originally contemplated argument date of 9/6/77, it appearing that affidavits and written representations submitted on defendant's behalf in these proceedings require response clearly indicating the extent of factual agreement or disagreement in order properly to focus legal inquiry. In the interim, government counsel is promptly to submit such response in writing with appropriate documentation. Latimer, M. m-8/11/77. Copies mailed to counsel.					
8/29	Response of the United States of America to Defendant's Rply, filed.		3	8/29/77	G	
9/6	Hearing held on deft's Motion to Dismiss. 11:30 to 11:55 A.M. Arguments of counsel. For the reasons stated in open Court the motion to dismiss is denied. Court inquires of defense counsel and deft. if they wish the case transferred to another judge. Counsel request time to decide. Zampano, J. m-9/6/77		3	9/6/77	G	8
9/6/	Motion to Dismiss endorsed: For the reasons stated in open Court, the motion to dismiss is denied. Zampano, J. m-9/6/77 copies mailed to counsel					
9/14	Motion to Recuse, filed by deft.					
9/19	Following endorsement on deft's Motion to Recuse: Motion granted. Judge Daly has agreed to a transfer of this case. Zampano, J. m-9/19/77. Copies mailed to counsel.					

FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER		DATE	RECIPT NUMBER

3

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs PEREIRA, VALDEMAR DA SILVA

N-77-72 1

Yr. | Docket No. | Def.

PROCEEDINGS (continued)

V. EXCLUDABLE DELAY

DATE	(Document No.)	(a)	(b)	(c)	(d)
1977					
9/20	CHANGE OF PLEA: Deft. request leave to change his plea of not guilty entered earlier to ct. one. Court grants request and orders previous plea erased from the record. Deft. is put to plea again and pleads guilty to count one. Court enters a finding of guilty to count one. Case continued on same bond for sentencing on 10/20/77 at 9:30 A.M. Daly, J. m-9/21/77				
9/20	On TFGD's Jury Assignment List: 10/20/77 at 9:30 A.M. for sentencing. Daly, J. m-9/21/77.				
9/23	Court Reporter's Notes of Proceedings held on 9/19,20/77, filed. (Gale, R.)				
9/27	On RCZ's Jury Assignment List: transferred to Judge Daly. Zampano, J. m-9/27/77.				
10/11	Court Reporter's Transcript on Hearing on Motion to Dismiss Indictment on 9/6/77, filed.				
" "	Court Reporter's Sound Recording of Proceedings held on 6/10/77, filed. Russell, R.				
10/20	DISPOSITION: Impr. one year on ct. one. Execution stayed until appeal is heard. Daly, J. m-10/21/77				
10/21	Substitute page 8, 16, 17, 22, of transcript filed on Oct. 11, 1977, filed. Cunningham, R.				
10/25	Motion for Non Surety bond endorsed: Granted. Bond set at \$1,000.00 non surety. Daly, J. m-10/26/77. copies mailed to counsel.				
10/25	Appearance bond in the amount of \$1,000.00 non surety, filed by deft and approved. Daly, J. m-10/28/77.				
10/27	CJA Form 23 (financial affidavit), filed by deft.				
" "	Notice of Appeal, filed by deft. copies sent to U. S. Atty.				
10/26	Judgment and Commitment, filed and entered. Daly, J. m-10/28/77 copies distributed.				
10/28	Court Reporter's Notes of Proceedings (disp) held on 10/20/77, filed. Cohen, R.				
11/2	Certified copy of docket entries, Notice of Appeal together with Criminal Information Form A sent to Clerk, U.S.C.A.				
11/7	JS-3 mailed to A.O.				

RECEIVED

JUN 15 1977

OFFICE OF THE FEDERAL
PUBLIC DEFENDER, N.H.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED
JUN 3 2 58 PM '77
U.S. DISTRICT COURT
HARTFORD, CONN.

UNITED STATES OF AMERICA :

v. :

VALDEMAR DA SILVA PEREIRA :

CRIMINAL NO. N-77-72
(Title 8, United States Code,
Section 1326)

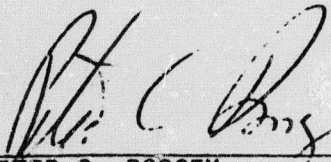
I N D I C T M E N T

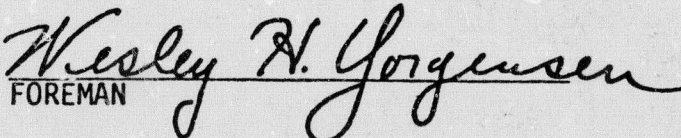
THE GRAND JURY CHARGES:

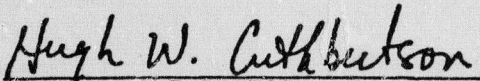
ONE COUNT

On or about May 16, 1977, at Wallingford, in the District of Connecticut, VALDEMAR DA SILVA PEREIRA, an alien, who was arrested and deported from the United States on April 25, 1975, was wilfully and knowingly present and found in the United States, to wit: in Wallingford, Connecticut, without the advance consent of the Attorney General of the United States and without establishing that he was not required to obtain such advance consent as required by law.

A TRUE BILL


PETER C. DORSEY
UNITED STATES ATTORNEY


FOREMAN


HUGH W. CUTHBERTSON
ASSISTANT UNITED STATES ATTORNEY



UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

-vs-

VALDEMAR DaSILVA PEREIRA

CRIMINAL NO. N-77-72

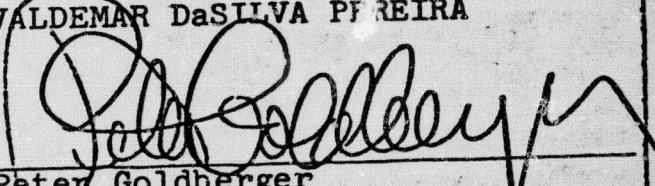
MOTION TO DISMISS

The defendant, Valdemar DaSilva Pereira, respectfully moves this Court to dismiss the indictment in the above-captioned case, which charges him with a violation of 8 U.S.C. §1326 (return to the United States without permission after arrest and deportation), on the grounds that his deportation was unlawful and that the prior conviction upon which the deportation was based is constitutionally invalid. Neither an unlawful deportation nor an invalid conviction may be made the basis of this indictment and prosecution.

Wherefore, the defendant moves the Court to dismiss the indictment and, if the government disputes the underlying facts, for an evidentiary hearing to establish his claims.

THE DEFENDANT
VALDEMAR DaSILVA PEREIRA

By:


Peter Goldberger
Asst. Federal Public Defender
770 Chapel Street
New Haven, Connecticut 06510
Attorney for the Defendant

Dated: July 15, 1977

CERTIFICATION

I hereby certify that a copy of the above Motion to Dismiss has been mailed to Hugh Cuthbertson, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, this 15th day of July, 1977.

NEW HAVEN

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT JUL 15 3 33 PM '77

U.S. DISTRICT COURT
NEW HAVEN, CONN.SEP 6 3 35 PM '77
U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES OF AMERICA

-VS-

VALDEMAR DaSILVA PEREIRA

CRIMINAL NO. N-77-72

MOTION TO DISMISS

*1/6/77
2 reasons
stated in
pen court,
the motion
to dismiss
is denied.
R13 August
4507*

The defendant, Valdemar DaSilva Pereira, respectfully moves this Court to dismiss the indictment in the above-captioned case, which charges him with a violation of 8 U.S.C. §1326 (return to the United States without permission after arrest and deportation), on the grounds that his deportation was unlawful and that the prior conviction upon which the deportation was based is constitutionally invalid. Neither an unlawful deportation nor an invalid conviction may be made the basis of this indictment and prosecution.

8-11-77 - U.S.A. vs. Pereira, Criminal No. N-77-72

On referral to undersigned for expedited argument of legal issues, with consent of counsel the instant motion is continued to originally contemplated argument date of 9/6/77, it appearing that affidavits and written representations submitted on defendant's behalf in these proceedings require response clearly indicating the extent of factual agreement or disagreement in order properly to focus legal inquiry. In the interim, government counsel is promptly to submit such response in writing with appropriate documentation.

A.H.L.
Arthur H. Latimer
United States Magistrate

FILED

JUL 11 11 PM '77

U.S. DISTRICT COURT
NEW HAVEN, CONN.

MICROFILM

001-107

7

1 THE COURT: I will hear the motion
2 to dismiss in the United States versus Pereira,
3 Criminal Number 77-72. I believe we have a motion
4 to dismiss?

5 MR. GOLDBERGER: That's right, your
6 Honor.

7 Is the record being kept only on tape
8 this morning?

9 THE COURT: No.

10 MR. GOLDBERGER: Oh. It's shorthand.

11 THE COURT: That's the old reliable way.

12 MR. GOLDBERGER: That's right.

13 THE COURT: Long before we had the
14 machines. I'm sure that record is going to be as
15 accurate, if not more so, than with the machines.

16 MR. GOLDBERGER: It just shows how short
17 a time I have been practicing in this Court.

18 Your Honor, our motion to dismiss is based
19 on a Constitutional ground and on statutory ground.

20 The charge, as you know, against Mr.
21 Pereira, is essentially being in the United States
22 without the permission of the Attorney General after
23 having been previously deported.

24 The Constitutional defense is based on
25 the Burgett case as interpreted in Judge Newman's

1 Megura decision. The statutory defense is based on
2 the interpretation of this statute presented in the
3 decision of Judge Moore for the Ninth Circuit, which is
4 discussed in our brief, among other cases.

5 It's true, as the Government argues,
6 that both defenses are based ultimately on our claim
7 that his previous convictions are the basis of this
8 prosecution and that those previous convictions are
9 invalid because they were based on involuntary and
10 unintelligent guilty pleas.

11 I think that the basic premise of our
12 argument is very simple under each argument. In the
13 case of the statutory argument, it is, as Judge Moore
14 said, that when Congress used the word, "Deported,"
15 in the statute, an alien who had been deported, it
16 meant an alien who had been deported according to law,
17 and that when a Defendant raises the substantial claim,
18 as I believe we have through our affidavits, that there
19 is a basis to say that that deportation was not lawful,
20 that the Defendant is entitled to put that in issue and
21 to have the Government prove that there was a deportation
22 within the meaning of the statute and to prove that
23 beyond a reasonable doubt because that's an element of
24 the offense.

25 Under the Constitutional argument, again,

4

1 the argument is rather simple. As the cases interpret-
2 ing Burgett have said, that where the prior conviction
3 is alleged to be invalid and where it forms a substan-
4 tial part of the case against the Defendant on a new
5 charge, whether or not it is an element of that
6 charge, the Government may be put to its proof to show
7 that it is a valid conviction when the validity of
8 the conviction is put in issue, as we have done.

9 Now, I think that both briefs on re-
10 reading them are guilty to some extent of simply
11 counting the precedents on one side or the other
12 without analyzing them as carefully as we might
13 have, so I would just like to devote a few moments
14 to telling you why I think that the cases on which the
15 Government relies are not persuasive and are not
16 controlling.

17 The two Circuit Court cases on which it
18 relies are the Tenth and the Fifth Circuit cases. The
19 Tenth Circuit case is one of the very early ones
20 dealing with this statute, a 1963 case. In that case,
21 the Defendant insisted that as an element of its proof,
22 the Government must hold a little deportation hearing
23 right here in the courtroom without the Defendant having
24 put on any kind of a showing of a flaw.

25 I believe that the District Judge and the

1 Tenth Circuit correctly rejected that position that
2 the burden that the Defendant was attempting to put on
3 the Government in that case was too great and was
4 unfair and was unnecessary, but it's not the position
5 that we are taking here.

6 We have presented a specific contention
7 that we have a flaw in the deportation hearing that
8 is based on an unconstitutional conviction. We pre-
9 sented substantial evidence of that in the form of
10 affidavits. We are prepared to go forward with live
11 witnesses.

12 The Fifth Circuit case, which is the
13 only other Circuit involved on which the Government
14 can rely, the defense that the Defendant wanted to put
15 forward there was that he was entitled to a statutory
16 exemption from deportation, that had he presented it
17 in his deportation hearing, the Judge would have found
18 him exempt from deportation because of his family status.

19 Now, that was a claim that was uniquely
20 within the competence and the province of the immigra-
21 tion authorities, and it's entirely distinguishable
22 from the defense that we are presenting here, which is
23 the one which our Circuit in the Marino case, which I
24 cited, has held cannot be ruled on in the deportation
25 hearing.

1 In other words, if Mr. Pereira in 1965
2 or any later time had said to the Judge, "Judge, you
3 can't base my deportation on those convictions because
4 they are Constitutionally invalid," the immigration
5 judge would have been entirely correct to say, "I can't
6 go into that. You get a court of competent jurisdic-
7 tion to tell me that, and then I won't use them against
8 you, but until they have been overruled in court, I
9 must depend on the court's most recent ruling about those
10 convictions."

11 Again, that is the position which is
12 acceptable to us and is consistent with the defense
13 that we are presenting. Here we are, in a court of
14 competent jurisdiction. This Court certainly has the
15 authority and the knowledge to say whether these are
16 valid convictions and, thus, to say under Burgett
17 whether they can be used against the Defendant.

18 There are also two District Court cases
19 that the Government relies on. One of them is the
20 Muhammad case, which the Government describes is the only
21 case within the Circuit on this issue. It's within
22 the Circuit, it's true; it's a Southern District case;
23 and, in that case, it's interesting to note that the
24 Government took the position that the Defendant could
25 contest the validity of his deportation right there as a

1 defense to the criminal case against him, and what the
2 Defendant was trying to do was to continue his criminal
3 case indefinitely so that he could reopen his deporta-
4 tion case and contest the order of deportation on the
5 ground that his lawyer at the deportation hearing had
6 been ineffective, and Judge Metzner's decision was,
7 I think I have to say, simply to list the authorities
8 on one side and list the authorities on the other
9 side, make no analysis whatsoever of the arguments
10 presented in either group of cases, and then say, "It's
11 obvious that you can't make this kind of an attack; the
12 Government is not stating a strong enough position; and,
13 I won't allow this defense to be made."

14 The only case which is even close, I think,
15 for the Government is the Bruno case, which is a District
16 Court case from Missouri. In that case where the
17 defense was essentially the same as in ours -- that is,
18 a prior invalid conviction because of a guilty plea --
19 the Judge said that no attack could be made, but the
20 District Judge did not take any account of Burgett or a
21 Constitutional argument, so that in our District where
22 we have the Megura case saying that you can raise
23 collateral Constitutional attacks in the course of
24 criminal proceedings, we are in a different position.

25 Apparently, even the defense lawyer didn't

1 raise that issue or the Judge felt that it was fore-
2 closed or something by local authority because it is not
3 addressed. Likewise, our statutory argument is not
4 addressed in the Missouri case because the Judge said
5 that he was willing to assume in that case that you
6 could raise a statutory defense; yet, he didn't seem
7 to recognize that the invalidity of the guilty plea
8 would raise the statutory defense under Section 1252(b)(4),
9 as we are doing; in other words, a claim that a deporta-
10 tion must be based on reasonable, substantial and
11 probative evidence and that an unconstitutional convic-
12 tion is not reasonable, not substantial, and not
13 probative.

14 So, I think that our argument is soundly
15 grounded in the precedents. It is nothing radical. It
16 is similar to the Megura defense. And, it is one which
17 I think the Court should allow us to present evidence
18 on.

19 THE COURT: Well, the Government goes a
20 step beyond and in a way argues with a two- or three-
21 pronged defense to your motion.

22 One is the point that you have addressed,
23 and you have addressed it fully, and I don't think much
24 more can be said on it. However, the Government goes on
25 to say, "Well," even assuming for the sake of argument

1 that the 1965 conviction is somehow available for
2 challenging, it has absolutely nothing to do with this
3 case; that the Government is relying on the Defendant's
4 entry as a stowaway on March 2, 1968, without inspec-
5 tion and, second, his deportation in 1966; that this
6 deportation does not rely upon the Defendant's convic-
7 tion in 1965."

8 Did you pick that up?

9 MR. GOLDBERGER: The Government withdrew
10 that claim in its memorandum --

11 THE COURT: Oh, I'm sorry.

12 MR. GOLDBERGER: -- filed on the 26th of
13 August in response to the very same query that you just
14 raised, which I think really pointed out a serious
15 weakness in the case as we had presented it previous
16 to that date. Judge Latimer pointed that same flaw
17 out and directed the Government to produce transcripts
18 of those hearings to see whether that assertion was
19 true, and on August 26th, the Government filed a paper
20 saying that on the basis of the transcripts, the Govern-
21 ment withdraws its claim that any ground was advanced or
22 proved other than the original deportation of 1965 which,
23 in turn, we say was solely dependent on his prior
24 convictions.

25 THE COURT: Yes. I failed to note that.

1 MR. GOLDBERGER: You are absolutely
2 right to point out that that would have been a serious
3 problem with our argument, but it's a problem that is
4 simply not based on the record.

5 THE COURT: Very well. You are quite
6 correct. I now find that August 29, 1977, memorandum
7 submitted by the Government wherein the Government
8 states it does withdraw its claim that entry without
9 inspection was a ground advanced by the Service or given
10 by the immigration judge as a reason for the Defendant's
11 deportation.

12 MR. GOLDBERGER: Your Honor, you were
13 saying that there might be a third prong.

14 THE COURT: The third is the Constitu-
15 tional point. I am looking at the old --

16 MR. GOLDBERGER: You mean that the
17 Government claims that if we had a hearing, the
18 Defendant would lose?

19 THE COURT: Yes.

20 MR. GOLDBERGER: Well, at this point, I
21 think all you wanted to hear was whether we were
22 entitled to such a hearing. We will take our chances
23 at the hearing. We have interviewed the witnesses and
24 presented affidavits either from them or about what
25 they have to say, and I think that we can successfully

1 attack the guilty plea under the Second Circuit stan-
2 dards.

3 THE COURT: You are quite right that
4 that point has to wait until a ruling.

5 MR. GOLDBERGER: There would, of course,
6 be no need to address the Constitutional argument, the
7 argument under Burgett, Boykin, Megura, if the Court
8 were simply to hold as a statutory matter that Judge
9 Moore was correct when he sat on the Ninth Circuit and
10 that an invalid guilty plea cannot be substantial
11 evidence under the statute.

12 THE COURT: Yes. The issue is clearly
13 framed.

14 Mr. Cuthbertson?

15 MR. CUTHBERTSON: Your Honor, I won't
16 spend much time on the question of the collateral attack
17 since that is outlined fairly well in the papers that
18 have been filed. I would just note a few things.

19 I think it's interesting that Mr.
20 Goldberger pointed out that in the Muhammad case, which
21 we claim and I think it is the only decided case in this
22 Circuit on the question, that in that case, if the
23 Government argued that a Defendant could collaterally
24 attack his deportation hearing during prosecution under
25 Title Eight, Section 1326, then I think the Judge's

1 ruling in that case is even more compelling in view
2 of the Government's position there, that is, urging
3 that the Defendant could collaterally attack it, and the
4 Judge said, "No, you are wrong; he can't."

5 So, it seems to me with that position
6 being pressed by the Government and with the fact that
7 the Judge noted all of the conflicting authorities
8 among the various Circuits and he came out with a
9 decision the way he did, that in my view makes the
10 results more compelling and indicates the results that
11 should be reached here.

12 With that whole argument aside, we also
13 make the claim in our memorandum that the Defendant's
14 claims, both Constitutional and statutory, are really
15 the same, and that if you find and rule the same way
16 Judge Metzner did in the Southern District, he should
17 be precluded from raising either statutory or Constitu-
18 tional claims here; that, in essence, they are the
19 same.

20 He is trying to collaterally attack an
21 order for deportation during prosecution for illegal re-
22 entry, and that we say can't be done during this
23 proceeding.

24 If you view those two grounds as truly
25 separate and if you view Judge Metzner's decision merely

1 as saying, "You can't raise the statutory claims;
2 you can't attack the deportation order; but, we will
3 let in the Constitutional claim, the Burgett and Megura
4 claim," which we say are the same -- and this is in
5 case you view them as separate -- I think you reach the
6 same result.

7 It seems to me the Government's case
8 is not predicated on any conviction. The Government
9 would have no occasion to put any conviction in
10 evidence, and that would never arise under the Megura
11 standards, plus because of Megura, we are talking
12 about a situation where Judge Newman said that the
13 indispensable part of the Government's case was the
14 Defendant's conviction, and that would not be the
15 case if the deportation order was not in issue.

16 I think the Defendant's test is clear.
17 He is applying a test from the area of ports, the "but
18 for" test: But for his deportation, he wouldn't have
19 re-entered illegally.

20 I don't think that is the proper test. We
21 are not talking about direct causation. Deportation is
22 a consequence of his conviction, but it is a collateral
23 consequence, it is not a certain consequence, and if an
24 individual is deported, it seems to me there are ways he
25 can come back into the country legally, so the "but for"

1 test falls for several reasons. It is just not valid
2 here.

3 As we say, the deportation order can be
4 attacked, and you can review the deportation hearing,
5 but I think, again, the deportation order will stand
6 up because as Mr. Goldberger has said, during the
7 deportation hearing, an alien cannot attack the valid-
8 ity of a conviction which forms the basis for his
9 deportation. If he can't attack it there and if,
10 therefore, he were to appeal that deportation order,
11 that deportation order would be affirmed.

12 It seems to me if he is trying to attack
13 it here on the same basis, when you look at the deporta-
14 tion order on the basis of what the immigration judge had
15 before him and what he did consider, the deportation
16 order then would be valid.

17 If we move from the statutory area to
18 the Constitutional area, I would distinguish this case
19 from the situation in Megura. There an individual was
20 being prosecuted for making a false statement in connec-
21 tion with the acquisition of a firearm, the false state-
22 ment being that he was not a convicted felon. The fact
23 he was a convicted felon was an indispensable part of
24 the Government's case.

25 I think that is distinguishable from this

1 case. The essential part of the Government's case
2 here is Mr. Pereira was deported, not why he was
3 deported. He knew he couldn't come back into this
4 country without the permission of the Attorney General,
5 and he did so. The reason for his deportation is
6 simply not an issue.

7 That brings us back to the initial
8 argument that he shouldn't be able to collaterally
9 attack it in this case. If you look at the facts in
10 that case, I think they point toward the reason for
11 that policy and the reason for Judge Metzner's
12 decision.

13 This is a Defendant who has been
14 deported on four previous occasions, who has been
15 prosecuted twice, convicted twice. One was for illegal
16 entry and one was for attempted entry as a stowaway.
17 This is a case where the Defendant admitted in his
18 initial deportation hearing that he, in fact, committed
19 the offenses for which he was convicted.

20 On page four of the transcript from
21 the 1965 hearing, in response to the immigration
22 judge's question as to his feeling as to whether he
23 was deportable, his response was that he committed the
24 crimes he was convicted of, and it was not for him to
25 say whether he was deportable or not.

1 I think particularly in this
2 situation, although in all situations of deportation
3 prosecutions, I think it is clear that Congress
4 did not intend that a Defendant could go back and attack
5 his original deportation order hearing, which is
6 some twelve years old in this case, and I think Judge
7 Metzner's decision was sound and grounded on these
8 reasons, and I would urge that you adopt his reasons.

9 MR. GOLDBERGER: I think that Mr. Cuth-
10 bertson said just a couple of things that I hadn't
11 addressed in my opening remarks.

12 First, let me refer to that transcript,
13 which is not quite as overwhelming as the Government
14 would have it. We are talking about someone here who
15 is speaking in a foreign language and who is quoted as
16 saying that he was actually found guilty of the crime
17 which he committed.

18 I don't know what Mr. Pereira meant by
19 that, but I don't think our attack on the guilty plea
20 in any event is grounded on a claim of innocence.
21 It is grounded on the claim of a voluntary waiver of
22 Constitutional rights. He was entitled to have a
23 trial. If he didn't understand what he was doing by
24 pleading guilty -- and that is our contention -- I
25 don't think that claim is entitled to much weight.

1 I am not even sure it is material. But, let me get
2 to two important things.

3 The Government would have you distinguish
4 this case from Megura because the conviction is not
5 an indispensable part of the Government's case. I take
6 it that is another way of saying it is not an element.
7 It is not an element except in the sense we are point-
8 ing out: It is an element to show he was deported,
9 and the weight of the authority says that means deported
10 according to law.

11 This is not something for the Jury.
12 It is a legal question for the Court either in a
13 bench trial or a motion to dismiss. Under Rule 102
14 of the Federal Rules of Evidence, it talks about the
15 considerations which underly elements.

16 It is a factual "distinguishment" from
17 Megura; it is not a legal or Constitutional distinction.

18 Under the reasoning of Burgett, as the
19 Fifth and Sixth Circuit cases we quoted in the memoran-
20 dum said, the test is not whether the conviction is
21 an indispensable part but whether it forms -- I believe
22 the expression is -- a substantial part, and the Fifth
23 Circuit says that such a conviction cannot be used for
24 any purpose, not just to provide an element, but for any
25 purpose.

1 As to the second point that the Govern-
2 ment made that I hadn't addressed, that if an alien
3 could not attack the conviction in his deportation
4 hearing and could not attack it on an appeal to the
5 Board of Immigration Appeals or in the Second Circuit,
6 he should not be able to attack it in this Court,
7 that is simply illogical because I could attack that
8 conviction in this Court in a habeas corpus proceeding,
9 and if I did so successfully, under immigration law,
10 the hearing would be reopened, the deportation order
11 would be set aside, and he would not be deported.

12 The Second Circuit case says that you
13 cannot attack the deportation order at the deportation
14 hearing, and it also says that the immigration judge
15 must abide by the ruling of the Court on the validity
16 of the conviction.

17 THE COURT: Obviously, the issue is not
18 free from doubt. Both sides have presented comprehen-
19 sive briefs with a full discussion of the legal author-
20 ities. I see no useful purpose being served by my
21 writing an opinion and just adding to the box score one
22 way or the other. Moreover, I do believe that time is
23 somewhat of the essence here, and for all those reasons,
24 I will rule from the bench.

25 The Court will adopt the Government's

1 position on this case and on this issue. Legally,
2 the Court is in agreement with the reasoning in the
3 cases cited by the Government, particularly the Bruno
4 case and Judge Metzner's case. After all, Judge
5 Metzner is a Judge in this Circuit, so his opinion in
6 my mind has some precedential value although, of course,
7 not binding, but I happen to agree with Judge Metzner
8 from the legal analysis standpoint.

9 From an equitable standpoint, there
10 is just no question in my mind that this is a flagrant
11 violation, and I see no compelling reason for me to
12 disagree with the authorities cited by the Government
13 on equitable grounds.

14 In some of the cases that I read, I
15 could see where the factual background was such that
16 the court felt that there should be a hearing as advo-
17 cated by the Defendant, and I believe whether or not
18 there is a legal distinction, there certainly is an
19 equitable distinction between the cases cited by the
20 Defendant and the case before me.

21 Obviously, however, I am ruling on the
22 legal issues, but I thought I would parenthetically
23 mention that I see no reason that the facts influence
24 me not to adopt what I consider a fairly sound reason-
25 ing by Judge Metzner and the Judge in the Bruno case, so

1 for those reasons, the motion to dismiss is denied.

2 The Court does accept and adopt the
3 Government's position as set forth in its brief on
4 this issue in all relevant respects, and by reference
5 thereto accepts the Government's reasoning as the rea-
6 sons for the motion to dismiss being denied in this case.

7 Where do we go from here?

8 MR. GOLDBERGER: Your Honor, that is
9 the only pre-trial motion. The case is ready for trial.

10 THE COURT: Very well. Is the Govern-
11 ment ready?

12 MR. CUTHBERTSON: The Government is
13 ready, your Honor. I believe this is on the 27th
14 list.

15 THE COURT: Before me or Judge Daly?

16 MR. GOLDBERGER: Before you.

17 THE COURT: Is there anything about what
18 I said here this morning which might make it preferable
19 for the Defendant to have this case tried before another
20 Judge? I did state that I thought the facts as set
21 forth by the Government were clear and a flagrant
22 violation of law. The other question that comes to
23 mind is that someone said I had this Defendant before
24 me on a prior occasion.

25 MR. GOLDBERGER: That is true.

1 THE COURT: When you used the term, "This
2 Court," you meant this particular Judge?

3 MR. GOLDBERGER: You personally.

4 THE COURT: I assume I had a pre-
5 sentence report?

6 MR. GOLDBERGER: Yes, you did.

7 THE COURT: Do you recall what year
8 that was?

9 MR. GOLDBERGER: I don't recall, but I
10 can look it up in a flash. I think it was '72, or
11 something like that.

12 THE COURT: Well, I'm not sure that is
13 grounds for disqualification.

14 MR. GOLDBERGER: The sentencing was
15 June, 1970.

16 THE COURT: If counsel for Defendant
17 and/or Defendant himself would feel much more comfort-
18 able in view of what I said here this morning and in
19 view of my prior knowledge or my prior contact with
20 this Defendant -- because I don't remember him at
21 all -- that either one would prefer another Judge, I
22 will certainly consider it, or if the Government has
23 anything to say on that issue -- would you like a day to
24 think about it?

25 MR. GOLDBERGER: I think I would.

1 THE COURT: Yes. Do you know when
2 Judge Daly is having court?

3 MR. GOLDBERGER: He hasn't announced his
4 trial calendar yet, and I know I would have heard because
5 I have at least one other case on that calendar, not
6 criminal cases, but it will have to be within a few
7 weeks.

8 THE COURT: Is there a problem here on
9 speedy trial? If it were held somewhere at the end
10 of September, would that be all right?

11 MR. GOLDBERGER: Well, your Honor, I
12 believe it is safe to say that Mr. Pereira is the
13 longest-held pretrial detainee in the District at the
14 moment. He has been incarcerated over one hundred
15 days, but it is not attributable to this case. He has
16 a surety bond obligation from the immigration authori-
17 ties.

18 THE COURT: Do you know if the Judges in
19 Hartford have earlier criminal sessions than Judge Daly?

20 MR. CUTHBERTSON: I haven't seen a list
21 yet, your Honor.

22 THE COURT: Mr. Goldberger, why don't
23 you think it over and talk it over with your client and
24 get back to me? If you and he or you or he believes
25 perhaps from all the circumstances it is best I withdraw

1 from the case, I will try to line up another judge
2 as fast as I can either in Hartford or in Bridgeport.

3 This is a felony, is it not?

4 MR. CUTHBERTSON: That's correct.

5 THE COURT: Very well. I will wait to
6 hear from counsel.

7 Adjourn Court until 2:00 o'clock.

8 (Whereupon, the hearing was concluded
9 at 12:05 o'clock p.m.)
10
11
12

13 CERTIFICATE

14 I hereby certify that the foregoing 23
15 pages are a complete and accurate transcription of my
16 original shorthand notes taken of the Hearing on Motion
17 to Dismiss Indictment in Criminal Case No. N-77-72,
18 United States of America vs. Valdemar DaSilva Pereira,
19 which was held before The Hon. Robert C. Zampano,
20 Senior U. S. D. J., on September 6, 1977.
21

22 _____
23 Margherita R. Cunningham, R.P.R.
24 Official Court Reporter
25

NEW HAVEN

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

-vs-

VALDEMAR DaSILVA PEREIRA

CRIMINAL NO. N-77-72

MOTION TO RECUSE

The defendant moves this Court (Robert C. Zampano, J.) to recuse itself from further consideration of this case on two grounds:

(1) The Court's comments on the record made in the course of denying defendant's motion to dismiss to the effect that defendant represented an egregious example of an immigration law violator whose case demonstrated no "equities." 28 U.S.C. §455(a), (b)(1). See United States v. Wolfson, No. 76-1393 (2d Cir., June 3, 1977), slip op. 4021.

(2) The Court's having previously read a presentence report concerning this defendant. United States v. Small, 472 F.2d 818 (3d Cir. 1972); cf. Fed. R. Crim. P. 32(c)(1); Gregg v. United States, 394 U.S. 489 (1969).

Respectfully submitted,



Peter Goldberger
Asst. Federal Public Defender
770 Chapel Street
New Haven, Connecticut 06510
Attorney for Valdemar Pereira

Dated: September 14, 1977

CERTIFICATION

I mailed a copy of the above Motion to Recuse to Hugh W. Cuthbertson, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, this 14th day of September, 1977.

30



FILED

SEP 19 4 01 PM '77

U.S. DISTRICT COURT
NEW HAVEN, CONN.

9/19/77

Motion
granted.
Judge Daly
has agreed
to a
transfer of
this case.

RCJ-jms
USDJ

United States of America vs.

United States District Court for

DISTRICT OF CONNECTICUT

VALDEMAR DA SILVA PEREIRA

DEFENDANT

DOCKET NO.

N-77-72 Criminal

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO-245 (6/74)

In the presence of the attorney for the government
the defendant appeared in person on this date.

MONTH Y YEAR

October 20, 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Peter Goldberger, Esq.

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged
☐ GUILTY.

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violation of Title 8, Section 1326,
of the United States Code (deported alien found in the United States)
as charged in Count One

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year on Count One.

SENTENCE
OR
PROBATION
ORDER

IT IS FURTHER ADJUDGED that the execution of sentence is stayed
until appeal is heard.

SPECIAL
CONDITIONS
OF
PROBATION

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

T. F. Gilroy Daly

31

Date OCT 25 1977

CERTIFIED AS A TRUE COPY ON

THIS DATE 10/28/77

BY

Kevin F. Rowe

() CLERK
X DEPUTY